

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
 }
RICHARD H. AND }
MIRIAM W. SEIDMAN }

For Appellants: Richard H. Seidman, in pro. per.

For Respondent: Bruce W. Walker
 Chief Counsel

James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Richard H. and Miriam W. Seidman for refund of personal income tax in the amount of \$3,305.40 for the year 1972. Since Miriam W. Seidman is involved in the appeal solely because a joint return was filed, Richard H. Seidman will hereinafter be referred to as appellant.

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Appellant's mother, who was not a resident of California, had an annuity policy from an insurance company on which she was receiving \$1,000 per month for life. After her death appellant's aunt, who was also not a resident of California, received \$300 per month for life under the policy. Appellant's aunt died in 1972, and appellant thereupon received a \$73,781.69 lump sum payment under the policy.

Appellant has been a California resident since October 1970. On his California personal income tax return for 1972, he reported \$39,608.21 of the amount he had received under the annuity policy as income in respect of a decedent. Subsequently he filed a claim for refund asserting that the \$39,608.21 was not taxable in California, but the claim was denied and this appeal followed.

Revenue and Taxation Code section 17105 provides:

Cal If any amount is received under an annuity, endowment, or life insurance contract, .if such amount is not received as an annuity, and if no other provision of this part applies, then such amount --

(1) If received on or after the annuity starting date, shall be included in gross income; or

(2) If subdivision (a) (1) does not apply, shall be included in gross income, but only to the extent that it (when added to amounts previously received under the contract -which were excludable from gross income under this part or prior income tax laws) exceeds the aggregate premiums or other consideration paid.

* * *

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(b) For purposes of subdivision (a), the following shall be treated as amounts not received as an annuity:

(1) Any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract; and

(2) Any amount received under a contract on its surrender, redemption or maturity.

In the case of any amount to which the **preceeding** sentence applies, the rule of subdivision **(a) (2)** shall apply (and the rule of subdivision **(a) (1)** shall not apply).

Respondent contends, and appellant appears to concede, that the policy in question was an "annuity, endowment, or life insurance contract" within the meaning of this section. There is also no dispute that the **\$39,608.21** was an amount "not received as an annuity" which was in excess of the aggregate premiums or other consideration paid for the policy. Accordingly, section 17105 requires that amount to be included in appellant's gross income, if no other provision of the Personal Income Tax Law applies.

Appellant contends, however, that another provision of the Personal Income Tax Law does apply. He relies on Revenue and Taxation Code section 17833, which states that a right to receive income in respect of a decedent:

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. . .shall be treated, in the hands of the estate of the decedent, or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction in which the right to receive the income was originally derived....

Appellant maintains that the \$39,608.21 was income in respect of a decedent, and argues that the money should therefore be treated as though his aunt or his mother had received it. Since neither his mother nor his aunt were California residents, appellant concludes that the money is not taxable in California.

We considered and rejected this identical argument in the Appeal of Preston T. and Virginia R. Kelsey, decided March 8, 1976. For the reasons set forth in that opinion, we hold that section 17833 does not apply to exclude payments received under an annuity from gross income solely because a previous annuitant was a nonresident. Accordingly, since it appears that no other provision of the Personal Income Tax Law applies, we conclude that the \$39,608.21 was properly included in appellant's gross income under section 17105.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Richard H. and Miriam W. Seidman for refund of personal income tax in the amount of \$3,305.40 for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, **this 15th** day of December, 1976, by the State Board of Equalization.

Dellamark Bassett, Chairman
George R. Higgins, Member
Philip L. Korin, Member
Iris Sankey, Member
_____, Member

ATTEST: *W. W. Amlop*, Executive Secretary